IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8330 of 1999

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

B R KAKAR

Versus

INSTITUTE FOR PLASMA RESEARCH

Appearance:

MR MUKUL SINHA for Petitioner

MR DG SHUKLA for Respondent No. 1, 2, 3

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 03/03/2000

ORAL JUDGEMENT

Heard the learned advocates. With the consent of the learned advocates, the petition is heard and finally disposed of.

2. The petitioner before this Court is the Chief

Administrative Officer in the Institute of Plasma Research, the respondent no. 1 herein [hereinafter referred to as `the Institute']. The respondent no. 2 is the Chairman of the Governing Council of the Institute and the respondent no. 3 is the Director in the Institute. The petitioner challenges the validity of the Order dated 31st August, 1999 made by the Director whereby the petitioner has been placed under suspension.

3. It is contended that the petitioner is the Chief Administrative Officer in the Institute and the Governing Council of the Institute is the appointing authority. The management and the administration of the Institute is governed by the Bye-laws made in that behalf. The said Bye-laws do not confer power upon the Institute or any of its officers to suspend any of its employees; except otherwise by way of punishment i.e., the Institute has no power to suspend its employee pending disciplinary action, much less when such an action is contemplated. Even if it is assumed that the Institute has power to suspend its employee, pending disciplinary action or when such disciplinary action is contemplated, such power is conferred upon the appointing authority alone. The petitioner being the Chief Administrative Officer, it is the Governing Council which is the appointing authority and except the Governing Council, no other officer could have suspended the petitioner. The impugned order having been made by the Director, it suffers from the vice of inherent lack of jurisdiction and is required to be quashed and set-aside. It is contended that the impugned order of suspension is actuated by malafide with a view to sidelining the petitioner and to confer the administrative powers upon one Shri Abhijit Sen, Senior Professor and Dean in the Institute. The impugned order having been made without the authority of law, the same cannot be validated by ex post facto validation by the Governing Council. In any view of the matter, on the facts of the case, the impugned order of suspension was not warranted. Mr. Sinha has relied upon the judgments of the Supreme Court in the matters of P.R Nayak v. Union of India [AIR 1972 SC 554]; Chairman & Managing Director, Andhra Bank & Ors. v. Ramoo Ramesh & Another [(1997) 11 SCC 610]; of Capt. Paulanthony v. Bharat Gold Mines Limited & Anr., [1999 (3) SCC 679]; and of Calcutta High Court in the matter of Siten Bose v. Ananda Bazar Patrika (Private) Limited [1981 LLN 529].

The petition is contested by the respondents. The Director has made counter affidavit and has contended that the Director is in overall charage of the Institute and has power to act in case of emergency. It is

contended that there were allegations of grave misconduct of corruption and destroying the official records against the petitioner which warranted the impugned order of suspension. It is further contended that the order of suspension has been made pursuant to the decision of the Governing Council. Further, pending this petition, under Office Memorandum dated 6th December, 1999, a chargesheet has also been issued against the petitioner. By the said Office memorandum, the petitioner has been placed under suspension pending disciplinary action, therefore also, the suspension of the petitioner requires to be upheld. In support of their contentions, learned advocates have relied upon Bye-laws 4.1.10, 4.1.18, 5.1, 5.1.1 and Appendix A/2 thereto. The said Bye-laws read as under :-

`4.1.10 DISCIPLINE : The authority which appoints a member of the staff of the Institute may suspend and discharge, dismiss, or impose any other suitable penalty for misconduct or for breach of the terms and conditions of his appointment. The disciplinary authority may hold an enquiry if it is of the opinion that such an enquiry is necessary.

4.1.18 REINSTATEMENT : In the following circumstances, an employee may be reinstated in service after suspension/dismissal/removal :

(1) If he had been placed under suspension pending criminal proceeding against him and is acquitted by the court of law and it is decided not to proceed further departmentally.

(2) If he had been placed under suspension pending departmental proceedings against him and if those proceedings are either withdrawn for any reason or if he is exonerated or if he is awarded a penalty other than that of removal/dismissal.

(3) If the penalty of removal/dismissal imposed upon him earlier is set aside by Appellate Authority.

5.1.1 BUSINESS OF THE INSTITUTE : It shall be the duty of the Director to carry on the work of the Institute under the control of the Council in accordance with the Rules and Bye-laws for the administration and management of the Institute. In case of an emergency, he may take such action

as may be necessary and report to the Council.'

Mr. Sinha has submitted that in the very nature of the establishment, the Chief Administrative Officer is placed in the overall control of the administration of the Institute and the Chief Administrative Officer is answerable to the Director alone. The Director and the Dean, both are academic posts connected with the Research & Development. However, with a view to sidelining the petitioner and to bestow the administrative powers upon the Dean Shri Sen, the Director first by Order dated 23rd July, 1999, transferred seven areas of administration from under the control of the petitioner to that of the Dean, though the Dean is not the administrative officer. This was followed by order dated 4th August, 1999 divesting the petitioner of all his administrative and financial powers. This was further followed by an order whereby two other officers were ordered to take charge of all the papers/documents, files, etc. from the petitioner. It is, therefore, contended that the petitioner was sidelined and was divested of his administrative and financial powers by carefully planned strategy. These actions have been undertaken with a view to conferring the powers upon Shri Sen, the Dean who is a close friend of the Director. Thus, the impugned order is actuated by malafide and has been made for oblique purposes. It is next contended that under Appendix-A-2 to the Bye-laws, the appointing and the disciplinary authority for the post of Chief Administrative Officer is the Governing Council. Bye-law 4.1.10 provides for disciplinary measures. It empowers the appointing authority to suspend, discharge, dismiss or impose any other suitable penalty on the staff of the Institute for misconduct or for breach of terms of the appointment. The disciplinary authority is also empowered to hold an inquiry, if it is of the opinion that such a disciplinary inquiry is necessary. It is, therefore, submitted that the powers referred to in the aforesaid Bye-law are that of imposing penalty and suspension pending enquiry cannot be resorted to under the aforesaid Bye-law. Except the aforesaid Bye-law, there is no other provision which empowers the appointing authority i.e., the Governing Council or the Director to suspend the petitioner or any employee of the Institute, pending disciplinary action. Hence, the order has been made without the authority of law and in view of the inherent lack of jurisdiction, the order requires to be quashed and set-aside. It is next contended that assuming that Bye-law 4.1.10 confers power to suspend an employee pending disciplinary action even then such power is vested in the appointing authority

alone. In the case of petitioner, the Governing Council being the appointing authority, the Director had no powers to make the impugned order. Obviously, the order has been made by the Director and not by the Governing Council and is, therefore, bad and illegal. It is submitted that the administrative action cannot be validated ex post facto i.e. to say that the impugned order of suspension could not have been ratified by the subsequent decision of the Governing Council and any such ratification would not make the impugned order valid. In any view of the matter, the facts of the case do not warrant an order of suspension against the petitioner.

Mr. Shukla has submitted that under the Bye-laws, the Director has been placed in the overall charge of the management and the administration of the Institute and is, in case of emergency, empowered to take such action, as may be necessary. It is submitted that the suspension referred to in Bye-law 4.1.10 is not qualified and by very nature of the power, the said suspension refers to suspension pending disciplinary action. This is buttressed by the provision made in Bye-law 4.1.18. Bye-law 4.1.18 refers to reinstatement of an employee of the Institute after suspension/dismissal/removal. Paragraph 2 thereof refers to reinstatement after suspension, pending departmental proceedings. Thus, Bye-law 4.1.10 read with Bye-law 4.1.18 leaves no doubt that the appointing authority has power to suspend an employee of the Institute pending disciplinary action. It is further contended that it is well-known that the disciplinary authority, if has power to suspend pending disciplinary action, the employee can as well be suspended while contemplated inquiry. The allegations of malafide have been denied. It is submitted that the petitioner being the Chief Administrative Officer has misused his powers and upon preliminary inquiry, it is learnt that the petitioner has resorted to corrupt practices by receiving kick-backs from the various contractors. The petitioner is also alleged to have accumulated wealth beyond his known sources of income and has also been found to have destroyed the official record. In view of these allegations made against the petitioner, the order of suspension is wholly justified.

Mr. Shukla has relied upon the judgment of the Supreme Court in the matters of R.P Kapur v. Union of India & Another [AIR 1964 SC 787]; of Mysore High Court in the matter of Appasaheb Annappa Siruguppi v. The Town Municipal Council, Ramdurg [AIR 1972 Mysore 33]; of Rajasthan High Court in the matter of R. Bhadada v. The

University of Jodhpur & Anr. [1977 Lab.IC 509]; of this Court in the matter of Bachubha Ramsinhji v. Shivlal, IPS, Kutch & Ors. [AIR 1970 Gujarat 180]; and of Allahabad High Court in the matter of Badri Prasad v. President, District Board, Mirzapur [AIR 1952 Allh. 681].

In the matter of P.R Nayak [Supra], the Court was considering the order of suspension made under Rule 3 (1) of the Fundamental Rules. The order of suspension reads that, `Whereas disciplinary proceedings against Shri P.K Nayak, ICS are contemplated.' Rule 3 of the All India Service [Discipline & Appeal] Rules, 1969 made provisions in respect of suspension during the disciplinary proceedings. Sub-rule 1 thereof provides inter alia, that, `if, having regard to the nature of the charges and circumstances in any case, the Government which initiates any disciplinary proceedings is satisfied that it is necessary or desirable to place under suspension the member of the Service against whom such proceedings are started, that Government may - (a) if the member of the Service is serving under it, pass an order placing him under suspension'. Considering this proviso, the Hon'ble Court held that, `there is no inherent power of suspension postulated by the Fundamental Rules or any other rule governing the appellant's service conditions. Except Rule 3 of the All India Services (D&A) Rules, 1969, no inherent power authorising the impugned order of suspension was relied upon in itself ..... if Rule 3 which is the only rule on which the appellant's suspension pending disciplinary proceedings can be founded. It is not postulate an order of suspension before the initiation of the disciplinary proceedings and the Government initiating such proceedings can only place under suspension member of the Service against whom such proceedings are started, then, the impugned order of suspension which is clearest error merely states that the disciplinary proceedings against the appellant are contemplated without suggesting actual initiation or starting of the disciplinary proceeding must be held to be outside this rule.' It should be noted here that in Rule 3 under consideration, speccifically refers to right to suspension only after the disciplinary action was started. No express provision is made empowering the Government to suspend its servant against whom departmental proceedings are started. In view of the specific express provision, such power cannot be conferred by by implication either.

In the matter of Capt. M. Paulanthony [Supra], the Court has held that in absence of any specific rule

for payment of salary at a reduced rate which constitute the subsistence allowances, the employer would be liable to pay full salary even during the period of suspension.

In the matter of Andhra Bank & Ors. [Supra], the Court was considering suspension of a Bank Officer. The Court observed that relevant regulation made distinction between the disciplinary authority who could impose the punishment on the delinquent officer and the competent authority who could place him under suspension. Under the relevant Regulation, the Asstt. General Manager, the disciplinary authority who could impose the penalty of removal or dismissal, was not nominated as the suspending authority as well. That the Assistant General Manager though was the Disciplinary Authority could not be referred as a Competent Authority who could pass the order of suspension, the quashing of the order of suspension by the High Court was upheld by the Hon'ble Supreme Court.

A similar question arose before the High Court at Calcutta in the matter of Siten Bose [Supra]. On fact, the Court found that the appellant was wrongfully and illegally obstructed from joining duty without showing any reason. By the letter dated 10th June, 1972, the appellant was informed that the Management had desired to hold an inquiry regarding plaintiff's absence from August 28, 1971 to January 9, 1972 and from January 10, 1972 to May 24, 1972 and as a result of which, the question of allowing him to join his duties would be considered. The Court found that thus of the opinion that the appellant was obstructed from joining the duty without there being an order of suspension, however, action of the respondent was latter ratified and confirmed. The Court relying upon its earlier judgment where it was held that, `if the rights of the third parties are affected, the principals ratification of the agent's act cannot validate the action which was initially without any authority.' The Court, therefore, held that the letter dated 10th June, 1972 purporting to be an order of suspension having been issued initially without any authority must be held to be illegal, invalid, inoperative and not binding on the plaintiff.

In the matter of R.P Kapur [Supra], the Hon'ble Supreme Court had an occasion to discuss the general powers of suspension. The Court held that, `suspension is of two kinds viz., as a punishment or as an interim measure, pending a departmental inquiry or pending a criminal proceedings. On general principles, therefore, the authority entitled to appoint a public servant would

be entitled to suspend him pending a criminal proceedings, which may eventually result in a departmental enquiry against him.' In the matter of Appasaheb Annappa Siruguppi [Supra], the Mysore High Court was considering the power of suspension of the respondent Municipal Council. The relevant rules refer to power of suspension. Considering the language of the Rule, the Court held that, `the power to suspend - both by way of punishment and pending an inquiry is the power well known in relation to control exercise by employer over his employees. It is also not in every set of rules .... hence, it appears to us that when the word `suspend' is used without any qualification, more reasonable view to take is to it refer to apprehends both types of suspensions viz., suspension by way of punishment and suspension pending disciplinary inquiry'. The same is the view expressed by the Rajasthan High Court in R. Badada [Supra] and by the Allahabad High Court in the matter of Badriprasad [Supra].

In the matter of Bachubha Ramsinh [Supra], the Division Bench of this Court was considering the dismissal of a Police Head Constable by the District Superintendent of Police. The court found that the District Superintendent of Police was an officer subordinate to the appointing authority and held that the order of dismissal was violative of Art. 311 (1) of the Constitution of India. However, in respect of the order of suspension pending disciplinary proceedings, the Court considering the relevant rules did not accept the contention that the order of suspension passed by the District Superintendent of Police not being appointing authority, was vitiated. The order is made keeping in view the principles laid down in the above referred judgments.

Mr. Shukla has also produced copies of the communications made in respect of the suspension of the petitioner and the preliminary inquiry held against him. Copy of the report of the Preliminary Inquiry is also produced for the perusal by the Court.

Upon perusal of the above referred communication and the report of the Preliminary Inquiry, I find that some complaints; written as well as oral, were received against the working of the petitioner for which a preliminary inquiry was entrusted to the Dean Shri Sen. It was on account of the said complaints which were received sometime in the month of May, 1999, certain administrative powers of the petitioner were transferred

to the Dean by order dated 23rd July, 1999 and the petitioner was further divested of his powers by order dated 4th August, 1999. The Dean under his communication dated 23rd August, 1999 had submitted the report of the Preliminary Inquiry which confirms the allegations of corrupt practices and misuse of the powers made against the petitioner. The said report of the preliminary inquiry was sent to the Chairman of the Governing Council on 25th August, 1999, pursuant to which, under communication dated 31st August, 1999, under the instructions issued by the Chairman of the Governing Council, the Director was instructed to place the petitioner under suspension. Pursuant to which the impugned order had been made on 31st August, 1999. The concurrence of the other members of the Council was obtained by circulation and such concurrence was given by each of the members of the Governing Council on different dates, after the date of suspension.

In above view of the facts, I am of the opinion that the Director had acted in the interest of the administration. The misconducts alleged to have been committed by the petitioner being of grave nature and particularly, the petitioner having been found to have destroyed the official records, the same did warrant the order of suspension. The allegations of malafide made against the Director are wholly unwarranted and unjustified. On the facts of the case, the petitioner was required to be divested of his administrative and financial powers and if such powers for the administrative convenience were transferred to the Dean it cannot be said that the orders were made with a view to conferring the powers upon the Dean. I, therefore, reject the contention that the impugned order of suspension is actuated by malafide or has been made for oblique purpose.

The question that arises is whether any employee of the Institute can be placed under suspension pending disciplinary action. Bye-law 4.1.10 provides, inter alia, that, `the authority which appoints a member of the staff of the Institute may suspend and discharge, dismiss or impose any other suitable penalty for misconduct or for breach of the terms and conditions of his appointment...' The word, `and' used in the above Bye-law is obviously disjunctive. The word `suspension' is disconnected from the words `discharge, dismiss or any other suitable penalty for misconduct'. This necessarily means that the word `suspension' used in this Bye-law does not refer to suspension by way of punishment but it necessarily refers to suspension pending disciplinary

inquiry. This construction is buttressed by the provisions made in Bye-law 4.1.18. Paragraph 2 of the Bye-law 4.1.18 expressly refers to reinstatement of an employee who had been placed under suspension, pending departmental proceedings against him. Reading the two Bye-Laws together makes it clear that the Institute has power to suspend its employee pending disciplinary action. The said power is necessarily coupled with the power to suspend an employee while disciplinary action is contemplated.

In the matter of P.R Nayak [Supra], this power of the employer was expressly circumscribed by the relevant rule i.e., under the relevant rule, the Government was empowered to suspend its servant against whom the disciplinary action was started. In view of this specific rule, the Court held that the said rule cannot be extended ... and no power of suspension in view of contemplated inquiry could have been exercised. On the facts of the present case, the said judgment shall not be applicable. The General Principles discussed in the above referred judgments, in absence of any rule/proviso to the contrary, shall apply with full force. I am, therefore, of the view that the Institute has power to suspend its employee not only pending disciplinary action but also while such disciplinary action is contemplated.

This brings me to the question whether in the given set of facts, the impugned order can be said to have been made without the authority of law, whether it stands validated in view of the ex post facto decision of the Governing Council. It is indisputable that the Director has an authority to exercise the power in emergency. Considering the nature of allegations made against the petitioner and the allegation that he had destroyed official records, the Director could have resorted to the powers conferred upon him under Bye-Law 5.1.1. However, it is not the case of the Director that he had exercised the power under Bye-law 5.1.1. It, therefore, cannot be gainsaid that the Director being not the appointing authority had no power to place the petitioner under suspension. The subsequent approval or decision of the Governing Council would not validate the order which was made without the authority of law and thus, in my view, the impugned order dated 31st August, 1999 has been made by the Director without the authority of law. That, however, shall not entitle the petitioner to claim the relief prayed for. As observed hereinabove, after concurrence/decision of the Governing Council by Office Memorandum dated 6th December, 1999, a chargesheet has been issued against the petitioner, the petitioner

once again has been placed under suspension pending disciplinary action. Thus, the aforesaid office memorandum is a composite order initiating the disciplinary action against the petitioner as well as placing him under suspension, pending disciplinary action. There is no gainsaying that the said order has been made pursuant to the decision of the Governing Council. The petitioner has thus been placed under suspension pending disciplinary action by Order dated 6th December, 1999. The earlier order of suspension dated 31st August, 1999 has, therefore, lost its significance. Besides, there is one more reason why the petitioner is not entitled to the relief prayed for. Under Article 226 of the Constitution of India, the Court has a discretionary power to grant relief or to mould the relief or to refuse the same. On the facts of the present case, having regard to the gravity of the misconduct alleged to have been committed by the petitioner, even if the order of suspension were found to be incompetent, no relief shall be granted to the petitioner.

It is well-known and well accepted proposition of law that an employer has an inherent right to place an employee under suspension, pending disciplinary action against him. It is equally well accepted principle that the employer has a right to suspend his employee even before the initiation of the disciplinary action i.e. when his acts are being inquired/investigated into. Unless the said general power is fettered by a specific rule, the action taken under the said general power, unless found to be malafide or to be made for extraneous consideration or to be based on irrelevant materials, can not be interfered with.

Mr. Sinha has argued that while under suspension the petitioner is entitled to receive full salary. However, since the contention is not raised in the petition, the same is not considered. But, I do trust that the Institute will act in accordance with law.

In view of above discussion, the petition is dismissed. Notice is discharged.

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Prakash*